CHATIB KARI

v.

MOSBERT BHD.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[ORIGINATING SUMMONS NO. 319 OF 1983]
7 FEBRUARY 1984

LAND LAW: *Caveats - Private caveat - Notice by Liquidator to remove - Application by caveator for leave to proceed with suit - For extension of caveat until outcome of suit - Principle applicable - Delay in application for specific performance - Effect - Undertaking as to damages - Whether necessary.*

COMPANY LAW: *Winding-up - Application for leave under s. 226(3), Companies Act - Proprietory claim - Balance of convenience - Extension of caveat applied for at same time - Effect.*

In 1967, the plaintiff, Chatib, entered into an agreement with Amos William Dawe and Lim Meng Ah ("the Vendors") to buy a piece of land ("the said property") which was part of a large parcel of land ("the said land"). The Vendors were then trading as a firm under the name of Syarikat Mosbert. The said land was to be developed into a housing estate known as Taman Chendrakaseh ("the said Estate"). Under the agreement, Chatib was entitled, *inter alia*, to an execution of a proper registrable transfer if a new document of title had been issued by then; otherwise, to an execution of a deed of assignment and an irrevocable power of attorney transferring and assigning to Chatib all the rights, title and interest of the Vendors in the said property to Chatib. Chatib entered into possession of the said property, as provided by the agreement. By 27 March 1971, he had made final payment of the purchase price on the said property.

The said land had passed from the Vendors to Mosbert Enterprises Sdn. Bhd., which in 1968 sold the said land to Mosbert Berhad ("the Company"). On 12 January 1977, a winding-up order was made, that Mosbert Berhad be wound up, and the Official Receiver appointed Liquidator. On 1 April 1981, one of the two lots comprising the said land ("the said Grant") was sold to Jet Age Construction Sdn. Bhd. ("Jet Age"). On 22 September 1982, Chatib caveated the said Grant.

On 26 March 1983, Jet Age filed a caveat and on 17 April 1983, the Liquidator caused a notice to be issued to Chatib for the removal of the caveat. On 28 August 1983 Chatib filed an originating summons. The orders applied for were, *inter alia*, that he be granted leave to commence or proceed with a suit or suits against the defendant and that his caveat remain valid until the outcome of the suit or suits. A consent order was made that Chatib's private caveat be extended until final disposal of the originating summons, but on 29 October 1983, the Liquidator applied for an order that the consent order be set aside.

Held:

[1] Leave should be granted under s. 226(3), Companies Act 1965, to Chatib to institute the necessary proceedings against the Company to establish his claim to the said property. The leave should be unconditional, subject only to the above condition.

(a) Chatib's proprietory claim to the said property had much to be said for it both on the facts and the law. Chatib was an equitable owner who had not only paid in full but had entered into possession after the execution of the agreement of sale. The fact that he had been in possession for 12 years was in his favour. Limitation cannot operate to defeat a trust.

(b) The balance of convenience and the demands of justice make it imperative that leave the granted. The alleged delay of 15 years on the part of Chatib was of no importance.

(c) In the circumstances of the case, it did not matter that Chatib had not first filed an application confined to asking for leave before proceeding to a second application for extension of the caveat and a separate civil suit. Implicit in the granting of the order for the extension of the private caveat was the fact that leave had been granted under s. 226(3) to the extent of that "proceeding" under the originating summons. Further, having consented to the order, the Liquidator could not then ask for it to be set aside.

(d) Chatib did not become a mere unsecured creditor when the winding-up was made.

[2] In all the circumstances of the case, Chatib's private caveat should be extended till the disposal of the main action.

(a) There were issues, main and subsidiary, which deserve full enquiry and which raise serious questions which could be determined only by litigation.

(b) Delay on the part of Chatib in initiating his action for specific performance did not affect his right to an extension of the caveat. Distinction must be made between a bare cause of action and an established and accrued right. Chatib seemed to have already become an equitable owner and the contract, so far as he was concerned, was already performed.

(c) An undertaking on the part of Chatib as to damages was not necessary. Such an undertaking is not a *sine qua non* to an order extending a caveat. A caveat is not to be equated in all respects to an interlocutory injunction. The incapacity to register a dealing because of a prior caveat does not preclude the legal owner doing other things which fall short of registration. In any case, all the authorities considered indicate that the undertaking is the plaintiff's own recognizance. There is no suggestion that the undertaking must be backed by collateral.

Cases referred to:

Re David Lloyd & Co., Lloyd v. David Lloyd & Co. LR [1877] 6 Ch D 339
Lloyd v. David Lloyd & Co.
Re Aro Co. Ltd. [1980] 1 All ER 1067
Bridges v. Mees [1957] 2 All ER 577
Temenggong Securities Ltd. & Anor. v. Registrar of Titles, Johore & Ors. [1974] 2 MLJ 45
Steward v. Le Page [1915] 24 DLR 554
Nanyang Development [1966] Sdn. Bhd. v. How Swee Poh [1970] 1 MLJ 145
Eastern Holdings Establishment of Vaduz v. Singer & Friedlander Ltd. [1967] 1 WLR 1017
Mullins v. Howell [1879] 11 Ch D 763
Harvey v. Croydon Union Rural Sanitary Authority [1884] 26 Ch D 249
Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53
N. Vengadasalam v. Mahadevan & Anor. [1976] 2 MLJ 161

Tar Thean Choo. v. Cheah Kah Seong [1977] 1 MLJ 106
Ong Chat Pang & Anor .v. Valliappa Chettiar [1971] 1 MLJ 224
Eng Mee Yong v. Letchuman Chettiar [1979] 2 MLJ 212
Piang Hong Yon & Ors. v. Syarikat Seri Belian Sdn. Bhd. [1982] 1 MLJ 196
Teo Ai Choo v. Leong Sze Hian [1982] 2 MLJ 12
Plimmer Bros. v. St Maur [1906] 26 NZLR 294
Phang Swee Kim v. Beh I Hock [1964] MLJ 383
Tengku Mariah bte Sultan Sulaiman v. Halimah bte. Abdullah [1980] 2 MLJ 234

Legislation referred to:
National Land Code Act 56/1965, s. 326(2)
Companies Act 1965, ss. 226(3), 236, (1)(c), (1)(e), (2), (3), 291

Other sources referred to:
The Law of Company Liquidation, B.H. McPherson [1980] 2nd Edn., p. 159
Atkin's Court Forms 2nd Edn., Vol. 11, para. 139 p. 556, Vol. 22, pp. 70 & 71
Kerr on Injunctions 6th Edn., pp. 644, 645
Rowe on the Law of Injunctions 5th Edn., 1980, p. 275
Halsbury's Laws of England 4th Edn., para 1072

For the plaintiff - Julis Lim; M/s. H.H. Long & Co.
For the defendant - P. Suppiah; M/s. Suppiah & Singh

JUDGMENT

Mahadev Shankar J:

The legacy which Amos William Dawe and his friends left behind them in Johore is still very much with us and the name of Mosbert will continue to haunt the Courts for sometime to come.

Chatib bin Kari, the plaintiff in this matter (hereafter referred to as 'Chatib') was apparently one of those many Malaysians of modest means whose dream it was to become a landowner in his own right.

On 19 April 1967 he entered into a formal agreement (the said agreement) with Amos William Dawe and Lim Meng Ah (the Vendors) to buy some 6,000 square feet of land (hereafter referred to as the 'said property'). The said property was a small part of a large parcel of land comprised in the documents of title described as Johore Grant No. 72 and No. 2587 for Lots 83 and 1880 in the district of Johore and the Mukim of Plentong respectively. The land is hereafter referred to as 'the said land'. The Vendors were then trading as a firm under the style of Syarikat Mosbert. They represented to Chatib that they would develop on the said land a building estate known as Taman Chendrakaseh ('the said Estate').

The said agreement is quite comprehensive and was prepared by M/s. Allen & Gledhill.

Inter alia it provided that the Vendors would apply for sub-division of the said land so as to provide a new title to Chatib for the said property.

RM450 had already been paid towards the purchase price of RM1,500 for the said property and the balance was to be paid in monthly instalments of RM25.

Clause 5 of the said agreement provided that Chatib was entitled upon execution of the said agreement to enter into possession and enjoy all the profits and other benefits deriving therefrom.

Clause 4 of the said agreement provided that upon payment of the balance of the purchase price the Vendors will execute a proper registrable transfer to the said property if a new document of title had by then been issued. If not the Vendors would execute in favour of Chatib a deed of assignment and an irrevocable power of attorney transfering and assigning to Chatib all the Vendors' rights, title and interest in the said property and also constitute Chatib their true and lawful attorney to deal with the property as if he were the absolute owner thereof pending the issue of a new document of title.

Various other provisions were contained in the said agreement for the construction of a private dwelling house to be erected in accordance with plans approved by the Vendors' architects. (See Clause 10 (i)(iii) of the said agreement.)

Clause 13 of the said agreement provided that the said agreement was to be binding on the successors-in-title and the assigns of the Vendors.

Attached to the said agreement was a plan drawn by a licensed surveyor which clearly showed the location, area and other particulars relating to the said property which was identified in the said agreement as Private Lot No. 86 on the said Estate.

As he was entitled to under Clause 5 of the said agreement Chatib says he entered into possession of the said property and planted some fruit trees thereon intending to build a house thereon after the issue of the qualified title thereto and the transfer of the said property to his name.

After execution of the said agreement Chatib duly proceeded to pay his monthly instalments until 27 March 1971 when the last payment was made by way of final settlement of the purchase price.

From the receipts for these payments it is seen that up to 30 November 1967 Chatib made his periodic payments initially to M/s. Allen & Gledhill and thereafter to Sharikat Mosbert. The receipts prior to this date specifically identify the said property as 'Taman Chendrakaseh Lot No. 86.'

So do the receipts produced for 1968. However the name of the recipient had changed to 'Mosbert Investment & Development Limited'. This Company continued to issue receipts to Chatib up to 19 October 1969.

Meanwhile, within the Mosbert empire some changes were obviously taking place, the full ramifications of which are far from clear. The said land passed from the Vendors to Mosbert Enterprises Sdn. Bhd. This company had its registered office at 310, 311 OCBC Building, Johore Bahru which is the same address as that given for Mosbert Investment & Development Limited.

Mosbert Enterprises in turn sold to Mosbert Berhad various properties including the said land by an agreement dated 24 September 1968 which listed in the first schedule thereto 'Taman Chendrakaseh Phase 1 Johore Grant No. 72, Lot No. 83, Area 113 acres 2 roods 20 poles comprising 520 building lots of sub-divided land varying between 6,000 to 8,000 square feet per lot.' (It did not appear to affect Johore Grant 2587 for Lot 1880 in the Mukim of Plentong.)

By Clause 5 of the agreement Mosbert Berhad was obliged to take over all the liabilities of Mosbert Enterprises Sdn. Bhd. with regard to the sale of the sub-divided lots in the said land which had already taken place. The clause further provided that subsequent sums of moneys payable in respect of the sub-divided lots be paid to Mosbert Berhad.

If we now go back to the receipts produced by Chatib, it is observed that as from 15 December 1969 the recipient of the monthly instalments was Mosbert Berhad. In fact the receipt dated 15 December 1969 has the name 'Mosbert Investment & Development Limited' deleted and a rubber stamp 'Mosbert Berhad' superimposed thereon. A receipt dated 29 December 1968 discloses that Chatib was also paying for premium and assessment for Lot No. 86.

All this evidence was not controverted by the defendant. In a nutshell, Chatib, was a purchaser who had paid in full for the said property and had gone into possession. The argument advanced on his behalf was that he had become the equitable owner and that Mosbert Berhad had become trustees of the said property for him.

As to the absence of an immediate legal title, under Clause 4 of the said agreement Chatib was entitled to a transfer of the said property when the new document of title was issued by the Land Office. This exercise did not involve him in any undue expense. If the sub-division was not completed he had upon completion of the purchase price an option to require a deed of assignment and an irrevocable power of attorney to be executed by the Vendors in his favour. These documents were to have the effect of a legal assignment of the Vendors' rights to the said property and would also have constituted Chatib their lawful attorney with power to deal with the said property and to transfer the same to others as if he was the absolute owner thereof. But there was this important difference. He was to pay all legal expenses involved in the preparation of the relevant documentation and what is more he was required to use the Vendors' solicitors for the purpose. This imposition may explain why Chatib preferred to wait.

But whilst he waited, the controllers of Mosbert chartered a course for the Company which took them and their creditors into murky waters and ultimate disaster.

A winding-up petition was presented and on 12 January 1977 an order was made that Mosbert Berhad be wound up. On 21 June 1977 the Official Receiver was appointed Liquidator of Mosbert Berhad. He is referred to hereafter as the Liquidator.

The complexities of the Mosbert debacle so far as the said land was concerned was compounded by a whole host of caveats which were registered against it between 1976 and 1981. But these difficulties do not appear to have deterred Messrs. Jet Age Construction Sdn. Bhd. (Jet Age).

On 1 April 1981 Jet Age entered into an agreement with the Liquidator to buy Johore Grant No. 72 Lot 83 (hereafter referred as to the said Grant). 10% of the purchase price was paid on that day and the balance to make up the full purchase price amounting to RM2,005,750 was paid on 29 March 1982. The Liquidator thought that thereupon the purchase of Lot 83 aforesaid was completed and handed over the said Grant to Jet Age.

On 22 September 1982 Chatib caveated the said Grant claiming to protect his interest in the said property. Numerous other caveators also appeared to have filed caveats in that year.

Jet Age themselves filed a caveat on the 26th of March 1983 presumably to cover themselves for the very substantial balance of the purchase price which they paid to the Liquidator.

On 17 April 1983 the Liquidator caused a notice to be issued to Chatib requiring him to remove his caveat in accordance with the provision of the National Land Code.

This notice of intended removal of the caveat was served on him on 16 August 1983 and it gave notice that at the expiry of 1 month from the date of service his caveat would be removed unless he obtained an order of the Court extending the validity of the caveat.

On 28 August 1983 Chatib filed this originating summons. The orders applied for were that:

1. The plaintiff be granted leave of this Honourable Court to commence or proceed with such suits, actions, or proceedings (including the proceedings under this Summons) against the defendant in regard to the plaintiff's claim against the defendant relating to a portion of all that piece of land held under Grant 72 for Lot 83, Mukim of Plentong, District of Johore Bahru, which portion is known as Private Lot. No. Taman Chendrakaseh containing a total area of 6,000 sq. ft.;
2. The validity of Private Caveat vide Serial No. 1667/82 Jilid 131 Folio 34 registered on a portion of all that piece of land held under Johor Grant 72 for Lot 83, Mukim of Plentong, District of Johore Bahru, which portion is known as Private Lot 86, Taman Chendrakaseh containing an area of 6,000 sq. ft. shall remain valid until the outcome of the civil suit or suits or proceedings to be commenced by the plaintiff abovenamed against the defendant abovenamed or such time as this Honourable Court shall deem fit and proper;
3. The sealed copy or certified copy of the Order to be made herein be served upon the Commissioner of Lands & Mines, Johore;
4. The plaintiff be at liberty to apply for further extension upon expiry of the validity of the caveat abovestated:
5. Cost of this Application and other incidental expenses to be borne by the defendant abovenamed;
6. Such other relief that this Honourable Court shall deem fit and proper.

This originating summons was supported by an affidavit which deposed to most of the facts referred to earlier. Chatib was not alone in his anxieties. He said that approximately 300 sub-divided lots had been sold and the Liquidator had embarked upon an exercise for removal of the caveats, the effect of which would be to deprive him and the other purchasers of all their rights. This originating summons and affidavit were served on the Liquidator on 30 August 1983.

When it came on for hearing on 7 September 1983 the Senior Assistant Official Receiver Mr. Lee Yee Kuang appearing on behalf of the Liquidator came before the Judge together with Counsel for Chatib.

A consent order was made that Chatib's private caveat be extended until the final disposal of the originating summons.

The originating summons was then adjourned to a date in November 1983.

That the Liquidator was under no misapprehension as to what he was consenting to is borne out by the fact that some days after the consent order was made he made various amendments to the draft order forwarded to him and approved as amended. It was subsequently extracted on 12 September 1983.

On 29 October 1983 the Liquidator filed a summons-in-chambers herein through his Solicitors M/s. Suppiah & Singh. It applied for an order that the consent order made on 7 September 1983 be set aside and such further or other orders be made as deemed necessary.

A lengthy affidavit was filed in support of this application by Mr. Wong Thaim Seng, the Assistant Official Assignee, on behalf of the Liquidator.

Various reasons were advanced why Chatib's application should be dismissed and the order extending his private caveat be vacated.

In summary these reasons were:

1. That Chatib had not obtained leave of the Court to commence legal proceedings against the defendant.
2. That no suit had been filed for specific performance as yet.
3. That even if such a suit was filed it would be barred by limitation.
4. That an action for specific performance could not succeed as the said property was not identified.
5. That no claim could be made for the said property because it had not been sub-divided and made the subject of separate titles.
6. That Chatib had no registrable interest.
7. That as on 1 April 1981 Jet Age had become the beneficial owner of the said lot whereas Chatib had only caveated the land comprised therein on 29 September 1982.
8. That Chatib had not attached a sketch plan to his caveat and therefore his claim was void for uncertainty.
9. That unless prior approval granting leave had been obtained the Court cannot give an order granting an extension of the caveat.
10. That if at all Chatib had a claim he should have filed a proof of debt under s. 291 of the Companies Act 1965.
11. That having registered his caveat on 29 September 1982 his failure to take any further steps until the service on him of the notice of intended removal of his caveat went to show that his actions were vexatious and calculated to frustrate the Liquidator in carrying out the duties assigned to him under s. 236 of the Companies Act.

Affidavits were filed by and on behalf of Chatib in reply. At the hearing the Liquidator was represented by Mr. P. Suppiah. The arguments were addressed both to the summons-in-chambers filed for the Liquidator and to the residue of the originating summons which had been carried over.

At the conclusion of the hearing I made an order more or less in the terms of Chatib's originating summons and dismissed the application of the Official Receiver and Liquidator to set aside the order extending the private caveat and to dismiss Chatib's application for leave. I also gave certain directions as to the legal representation of the Liquidator.

I said then that I would give my reasons in a written judgment because this matter is one of some complexity.

The two primary issues in the proper sequence were:

(1) Whether in all the circumstances Chatib should be given leave of the Court to institute the necessary proceedings against the Company to establish his claim to the said property.

(2) Whether in all the circumstances the life of the private caveat filed by Chatib should be extended until the final disposal of the proceedings he was permitted to initiate.

These issues are inter-related and upon them hinged a number of secondary issues.

Now s. 226(3) of the Companies Act 1965 reads:

> When a winding-up order has been made or a provisional liquidator has been appointed no action or proceeding **shall** be proceeded with or commenced against the Company except-
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> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.

The corresponding section in the U.K. Act is s. 231.

Why is leave of the Court necessary? In *Re David Lloyd & Co., Lloyd v. David Lloyd & Co. LR* [1877] 6 Ch D 339 James LJ said at p. 344:

> These sections in the Companies Act, and the corresponding legislation with regard to bankrupts, enabling the Court to interfere with actions, were intended, not for the purpose of harassing, impeding, or injuring third persons, but for the purpose of preserving the limited assets of the Company or bankrupt in the best way for distribution among all the persons who have claims upon them. There being only a small fund or a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the Company with actions and incurring costs which would increase the claims against the Company and diminish the assets which ought to be divided among all the creditors.

In what circumstances is leave granted? In *'The Law of Company Liquidation'* by B.H. McPherson (1980) 2nd Edn., published by the Law Book Co. Ltd. Sydney, Australia there appears at p. 159 the following passage:

> ***Leave to Proceed***
>
> Cases in which the Courts have granted leave to commence or continue proceedings against a company in liquidation can be fairly readily resolved into two principal categories. In one, the determining fact has been the nature of the plaintiff's claim; in the other, the balance of convenience and the demands of justice.
>
> **(a) Proprietory Claim**. It has been said that where what the plaintiff is claiming from the company is in reality no more than his own property, leave to proceed will be granted as a matter of course. The underlying principle is that the Company should not, merely because of the fact that it is in liquidation, be permitted to withhold the plaintiff's property and, accordingly, the Court will permit proceedings to be taken by a landlord to re-enter for breach of covenant, and by a mortgagee, debenture holder, or licensee, for the enforcement of his security. This practice has sometimes also been justified on the ground that, because such property is not available for division among the general creditors, the persons entitled to it stand outside the winding-up and possess rights which they can enforce independently of liquidation. But because it is difficult to reconcile with the policy of avoiding expensive litigation, the practice of granting leave in these circumstances has on some occasions been viewed with considerable disfavour and it certainly will not be followed where the applicant for leave is offered all he is entitled to without the necessity for bringing action.
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> **(b) Balance of Convenience**. In *Century Mercantile Co. v. Auckland Provincial Fruitgrowers Society*, the Court adopted from *'Lindley on Companies'* the statement that in determining whether leave to proceed should be granted:
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> > The only material question to be considered is whether there are any circumstances which render it necessary that the action should be continued, or whether the claim of the plaintiff is not one which can be as easily dealt with in the winding-up as in any other way.
>
> According to this principle, the question is fundamentally one of expedience and convenience. It follows that proceedings brought primarily against third persons, to which the Company is a party only for formal reasons, are usually allowed to proceed, as also are claims which by

> their nature are likely to be more difficult or more expensive to settle in winding-up rather than by action at law. Conversely, leave is almost invariably refused where the claim is in respect of what is no more than a simple contract debt which can be submitted to proof in the ordinary way, although in one case proceedings were permitted where the liquidator was unduly dilatory in adjudicating upon the claim, and there also seems to be an established, though not too well authenticated, practice of allowing actions on claims which cannot be proved in winding-up.

It is plain therefore that where a person is asserting that property which he owns has been taken into the custody of the liquidator leave will readily be granted to enable that property to be retrieved. In *Lloyd v. David Lloyd & Co.* the Court was concerned with a mortgagee and James LJ said of the relevant section, at pp. 344, 345:

> But that has really nothing to do with the case of a man who for the present purpose is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property. The position of a mortgagee under such circumstances is, to my mind, exactly similar to that of a man who said, "You the company have got property which you have taken from me; you are in possession of my property by way of trespass, and I want to get it back again." A landlord might say, "You have property under lease from me, you have broken the covenants of the lease, and I have a right of re-entry in consequence of that breach." The company ought not, because it has become insolvent or has been minded to wind up its affairs, to be placed in a better position than any other lessee with regard to his lessor. So with regard to a mortgagee. The mortgagee says, "There is some property upon which I have certain specific charge, and I want to realize that charge. I have nothing to do with the distribution of your property among your creditors, this is my property." Why a mortgagee should be prevented from doing that I cannot understand. Power was given to the Court to interfere with actions restraining them or not allowing them to proceed, but this power was given because it was understood that the Court would exercise it with due regard to the rights of third persons, persons who were not members of the company, and who had not come in and claim to share in the distribution of the company's assets among the creditors, and who were not therefore quasi parties to the winding-up proceedings. The Court would have due regard to the rights of independent persons. A mortgagee is, to my mind, such an independent person, and his rights ought not to be interfered with because his mortgagors have chosen to become insolvent and to have a winding-up. I am of the opinion that the action ought to proceed, unless, the whole thing being under the control of the Court, the Court is able to say, We, on behalf of the company which is being wound up, will without further litigation of any kind give you all which you are entitled to have.

This case was cited with approval in *Re Aro Co. Ltd.* [1980] 1 All ER 1067.

Surely the position of an equitable owner such as Chatib is stronger than that of a mortgagee? Not only had he paid in full but it was also asserted that he had entered into possession after execution of the said agreement.

Mr. Suppiah's argument was that the only claim Chatib had was at best for damages for breach of contract, and that Chatib should have filed proof for such damages in the winding-up. In the same breath he says that Chatib's claim is barred by limitation. The invitation in effect was that Chatib should leave his oasis in Lot 86 to feed upon a mirage in the desert.

Far from limitation aiding the Liquidator it may have gone against him. Chatib appears to have been in possession for more than 12 years and even if it is argued that one cannot acquire title by mere adverse possession in Malaya, limitation cannot operate to defeat a trust.

Miss Julie Lim referred the Court to *Bridges v. Mees* [1957] 2 All ER 577 as illustrative of such a situation. See also *Temenggong Securities Ltd. & Anor. v. Registrar of Titles, Johore & Ors.* [1974] 2 MLJ 45.

On the merits therefore, Chatib's proprietory claim to the said property has much to be said for it, both on the facts and on the law.

Mr. Suppiah cited *Steward v. Le Page* [1915] 24 DLR 554 in support of his submission that leave should be refused. But a close reading of the judgment tends in favour of leave being granted. Idlington J said there at pp. 345, 346, 347:

> The ascertainment of the assets distributable amongst the creditors, so far as unsecured, is part of the duty of the liquidator under the direction of the Court. He cannot do that efficiently if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation.
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> Section 133, for example, furnishes a summary remedy which might be made applicable to respondent's claims, if of the clear and undoubted character their Counsel suggests.
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> If not of that character it is quite competent for the Court, in charge of the proceedings, to permit some more suitable remedy either in that Court or in such Court as it may direct.
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> The scheme of the Act does not in any way imply that any one is to be deprived of his right in law or equity.
>
> To say that some of the trust funds are traceable in such a way that in law they must be appropriated to meet the demands of particular *cestui que trustent* creditors, possibly in priority to others not so fortunate, means nothing in this connection.
>
> All such rights as any man or class of men may have in that regard or any way, must be followed and enforced in a due and orderly manner such as the "Winding-up Act" contemplates and in part prescribes, and evidently intends should be pursued.
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> The Act in many of its provisions may fall short of meeting what might well have been provided and prescribed for the emergencies of such cases as the respondents present.
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> The evident scope of the Act, however, clearly is that the Courts should be resorted to in order to determine the rights of any creditor or claimant, whatever they may be, according to the settled principles of law applicable thereto.
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> I see no difficulty in the claims of the respondents, if what they assert be correct, being established just as a mortgagee may be permitted to assert his claim.
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> It is therefore incumbent upon the Court having the matter in charge to give every person the liberty to prosecute his rights, whatever they may be in law, to enforce the same.
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> All that the Act by s. 22, as I understand it, means is that reckless and undesirable litigation should be avoided and the consequent waste of ruin thereby of the estate averted.
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> But whenever there is a fair claim of right in the way of lien or otherwise presented, he having it or the class he belongs having it, should be given the right to prosecute and establish the same.

As to the balance of convenience and the demands of justice, it is to be observed that the criteria here is whether there are any circumstances which render it necessary that the action should be continued or whether the plaintiff's claim cannot be dealt with in the winding-up.

Great emphasis has been laid by Mr. Suppiah upon the failure of Chatib to resort to proceedings against the Company earlier. He says that Chatib waited for 15 years without doing anything. Is this necessarily correct?

It is a notorious fact that sub-divisions normally take a long time in Malaya. If he got short shrift from Amos Dawe and his friends, was Chatib not entitled to expect that the Liquidator would deal with the rights of these numerous caveators in a clean, efficient and just manner?

But Chatib and the other caveators were in for a rude shock. The view taken by the Liquidator was that he would ride rough-shod over them and sell the said land over their heads. And having done so, it appears, as will shortly be seen, he literally constituted himself as official ejector on behalf of Jet Age who to all intents and purposes is the real combatant behind the scenes whom Chatib and the other caveators pitted against.

Since the Liquidator has formally repudiated any right on the part of Chatib (and the other caveators) I hold that both the balance of convenience and the demands of justice make it imperative that leave be granted. In all the circumstances of the case, the alleged delay of fifteen years is of no moment here. It was only when Chatib was served with the Liquidator's Notice of Intended Removal of his caveat that the writing was put up clearly on the wall for him that the Liquidator had allied himself with Jet Age and the speed with which Chatib moved thereafter was, in all the circumstances of this case, not unreasonable.

This is an appropriate juncture to deal with the subsidiary issues which arose from Mr. Suppiah's submission on the question as to whether leave should be granted.

He says that in *Nanyang Development [1966] Sdn. Bhd. v. How Swee Poh* [1970] 1 MLJ 145 the Federal Court held that an application under s. 326 (2) of the Land Code for an extension of a caveat is a 'proceeding'. He refers to *Atkin's Court Forms* 2nd Edn., Vol. 11, para. 139 at page 556 as authority, for the proposition that any application for leave must be made 'in the winding-up proceedings by summons served on the Liquidator and supported by an affidavit'. This he says is imperative because the Court must know all the circumstances of the winding-up before it can decide whether to grant leave. Since this originating summons was not made in the Companies (winding-up) Petition No. 5/76 (hereafter referred to as the Winding-up file) he says the Court must have granted the extension order without the benefit of the information contained therein. Furthermore, since s. 226(3) of the Companies Act was mandatory, the alleged omission to grant leave before the private caveat was extended on 7 September 1983 automatically avoided the order. The consent of the Liquidator to the order was said to be of no consequence. He referred to *Eastern Holdings Establishment of Vaduz v. Singer & Friedlander Ltd.* [1967] 1 WLR 1017.

In that case the Chancery Division of the High Court was held not to be proper venue for an interpleader summons to which a Company in liquidation was a respondent. The proper Court was the Companies Court and leave of that Court had first to be obtained since an interpleader summons was a proceeding against the Company.

There is no such separation of powers in the High Court at Johore Bahru and if there was any irregularity in Chatib's application not being made in the winding-up file it went to form rather than substance. My learned brother Judge Datuk Mohamed Yusoff who made the order extending the caveat was quite familiar with the winding-up file although at the time of the hearing of this originating summons I had not had the same advantage.

Did it matter that Chatib had not first filed an application confined to asking for leave and only having obtained that, filed a second application for extension of the caveat and a separate civil suit?

Chatib was under severe time constraints here because he had to get his order within 30 days of the service upon him of the Notice. Urgency was of the order of the day. As appears from his prayers in the originating summons he telescoped the application for leave into the application for the extension.

I hold that implicit in the granting of the order for the extension of the private caveat was the fact that leave had been granted to the extent of that 'proceeding' under the originating summons. The effect of this order although not stated in so many words was to grant leave *munc pro tunc* insofar as the proceedings for the extension of the caveat was concerned. The learned Judge must have been alive to the provision of s. 226(3) of the Act since the very first application envisaged litigation against the Company in liquidation in two stages, leave for 'the proceedings under this summons' and leave for such 'suits, actions or proceedings' in regard to the plaintiff's claim for the said property. It is to be noted further that the order extending the private caveat was only till the final disposal of the originating summons.

I hold this submission for the Liquidator to be totally devoid of merit. In any case, having consented to the order, it did not lie in the mouth of the Liquidator to ask for it to be set aside: See *Mullins v. Howell* [1879] 11 Ch D 763 and *Harvey v. Croydon Union Rural Sanitary Authority* [1884] 26 Ch D 249. Also S.C.P. 1979 paras. 2008 and 2010.

Out of deference to Mr. Suppiah's submission that the Court should seize itself of the information contained in the winding-up file in deciding whether to grant leave, I have since done so.

There is nothing in the winding-up file to suggest that I should not have granted leave. If anything, the reverse is the case.

On 6 September 1983 the Liquidator filed an *ex-parte* application in the winding-up proceedings for leave for M/s. Suppiah & Singh to assist him as provided by s. 236(1)(e) of the Companies Act 1965. In his affidavit-in-support of the application, Mr. Wong Thiam Seng specifically refers to Chatib's application under this originating summons. He says in so many words that it is a CONDITION of the sale of the said land to Jet Age that M/s. Suppiah & Singh shall be appointed to take all necessary action to deal with the encumbrances in the said land. The Liquidator's action to remove the caveat was thus at the behest of Jet Age. The Liquidator has in a sense only lent his name to the proceedings. Since Jet Age bought this land with their eyes wide open through the Liquidator they too must, in my view, and to echo the words of James LJ in *Lloyd v. David Lloyd & Co.* give the caveators all they are entitled to have, without further litigation, or suffer this matter to go to trial.

It follows from the above that I reject Mr. Suppiah's contention that Chatib became a mere unsecured creditor when the winding-up order was made thus denuding him of his claim to specific performance, divesting him of property of which he was then in possession and leaving him with a bare right to file a claim for refund of the moneys he paid. Admittedly specific performance is an equitable and discretionary remedy but whether it is to be granted with damages cumulatively or in the alternative must await the trial of the action which he had been given leave to file.

The only other issue is whether any terms should be imposed for the leave granted. In my discretion, I gave unconditional leave. I took into consideration all the circumstances of the case, some of which will be elaborated upon hereafter. He who seeks equity must do equity.

Chatib claims the said property but the title deed is in the hands of Jet Age. The value of the said property must have appreciated considerably since 1967 and I do not consider that any additional burden should be imposed upon Chatib for the privilege of asserting his rights.

I now turn to the second main issue in this action i.e. whether in all the circumstances Chatib's private caveat should be extended till the disposal of the main action.

To start with the very right to lodge the caveat was challenged. It was submitted that Chatib had no registrable interest because the said land had not been subdivided and made the subject of separate titles and that there was no way that the said property could be properly identified.

As against this is the evidence of a valid sale agreement in which Lot 86 was delineated on a survey plan and what is more Chatib had taken possession. He had paid in full. There was a strong body of case law cited in support of his claims to a registrable and caveatable interest. See *Temenggong Securities Ltd. & Anor. v. Registrar of Titles Johore & Ors.* [1974] 2 MLJ 45; *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53; *N. Vengadasalam v. Mahadevan & Anor.* [1976] 2 MLJ 161 and *Tar Thean Choo v. Cheah Kah Seong* [1977] 1 MLJ p. 106.

Then it was submitted that the caveat filed was void for uncertainty because the plan showing the location of Lot 86 had not been attached. This submission was not only inaccurate on the facts but came close to clutching at straws. (see para 5 (h) of Chatib's affidavit-in-reply Encl. 14.)

A point was also made that whereas Jet Age became beneficial owner by purchase of 1 April 1981, Chatib had only caveated the property on 29 September 1982. It was urged therefore that his claim was baseless. With the greatest respect this argument really begs the question. Jet Age were unable to register the transfer to them (if there was one) by the Liquidator. They bought the said land subject to the encumbrances therein. They had notice of other caveators on the date their agreement for sale on 1 April 1981. Chatib filed his caveat on 29 September 1982. Jet Age only paid the balance on 29 March 1983, having caveated the land themselves on 26 March 1983. The claims that they were the beneficial owners of the land, already sold to Chatib and the other caveators, is very far from having been made out. Since Jet Age were not the registered owners but purchasers subsequent with notice, it could be argued with some force that the onus of proof of their beneficial ownership is upon them. See *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 MLJ 224.

What then is left is the implications of the Privy Council decision of *Eng Mee Yong v. Letchuman Chettiar* [1979] 2 MLJ at p. 212.

The passages from the decision which are particularly relevant to the issues before me are set out hereunder:

> Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining the vendor in whom the legal title is vested from entering into any disposition of the land pending the trial of the action. The Court's power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases which it appears to the Court to be just and convenient to do so. Similarly in s. 327 it is provided that 'the Court ... may make such order on the application as it may think just.' The guiding principle in granting an interlocutory injunction is the balance of convenience;

there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the Court that there is a 'probability', 'a *prima facie* case' or a 'strong *prima facie* case' that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words that the evidence before the Court discloses that there is a serious question to be tried. *American Cyanamid v. Ethicon Ltd.* H-1, LHC and A-B, RHC P215.

This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat; he must first satisfy the Court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

In the case of a refusal by the vendor to complete a contract for the sale of land the normal remedy of the purchaser as plaintiff in an action is an order for specific performance of the contract; and in the absence of special circumstances, if it were shown that the vendor threatened to dispose of the land while the action was still pending, the balance of convenience would be in favour of granting an interlocutory injunction to prevent his doing so, provided that the plaintiff would be in a position to satisfy his undertaking as to damages if the action should fail at trial. So too in an application by the caveator under s. 327 for removal of a caveat, once the caveatee had met the first requirement of satisfying the Court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would be in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried. F-1, RHC P215.

Whether there should be an interlocutory injunction thus turns upon whether the evidence discloses that there is a serious question to be tried.

In my view, the main issues earlier set out are serious questions which can only be determined by litigation: And see *Piang Hong Yon & Ors. v. Syarikat Seri Belian Sdn. Bhd.* [1982] 1 MLJ 196.

The subsidiary issues also deserve full enquiry and in addition to those so far canvassed there are other areas which seem to invite enquiry in the winding-up file.

Section 236 of the Companies Act provides that the Liquidator may with the authority of the Court or of the committee of inspection do various things with a view to completing the winding-up including appointing an Advocate to assist him in his duties. (Section 236(1)(e).) Section 236(2) provides that the Liquidator may sell the immovable property of the Company by public auction or by private contract with power to sell the whole of such property or to sell the same in parcels.

Section 236(3) provides that the exercise by the Liquidator of the powers conferred by the section shall be subject to control of the Court and that any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

In this case, the Official Receiver is said to have entered into the contract to sell the said lot to Jet Age on 1 April 1981. I have not been able to find anything in the winding-up file which sets out the circumstances in which the Official Receiver entered into this contract and subject to correction it would appear that the contract was made without reference to the Court. It may well be that the Official Receiver could show that no such reference was necessary.

But on 6 September 1983 Mr. Wong Thiam Seng, the Assistant Official Assignee in Johore Bahru, affirmed an affidavit in the winding-up file in which he applied for leave under s. 236(1)(e) of the Companies Act for M/s. Suppiah & Singh to be appointed to assist the Official Receiver and Liquidator. This affidavit specifically mentions Chatib bin Kari. The affidavit states that the land was sold to Jet Age subject to all encumbrances and that it was a condition of the sale that M/s. Suppiah & Singh, solicitors for the purchasing Company, shall be appointed to take all necessary actions to deal with the said encumbrances on the said land.

In the nature of things, it may be reasonably assumed that these encumbrances were intended to refer to various caveats filed by Chatib and others against the said lot to protect their interests therein.

The application was made *ex-parte* and a Court order was made on 21 September 1983 appointing M/s. Suppiah & Singh.

Presumably in pursuance of this authority they entered the lists and assisted in the preparation of the affidavit of Mr. Wong Thiam Seng dated 7 October 1983 filed herein and also the summons-in-chambers dated 2 November 1983 which brought before the Court the issues, which we are now concerned.

If the minor matter of legal representation requires Court leave, should prudence have counselled an application to Court for directions in the matter of a sale in excess of RM2 million particularly in a case such as this where there were so many caveators of whose conflicting interests the Liquidator was not unaware?

Furthermore the affidavit filed by him in the winding up seem to suggest that only when he was required so to do by Jet Age did he take any action to have these caveats removed by causing Notices to Issue for the removal of the caveats and that too in 1983. (see para 6 Encl. 117 in the winding-up file.)

Another reason given by Mr. Suppiah as to why the caveat should be set aside was that Chatib had not 'timeously' prosecuted his claim for specific performance. He says that immediately after Chatib filed his caveat he should have initiated his action for specific performance. He relies upon *Teo Ai Choo v. Leong Sze Hian* [1982] 2 MLJ 12. There a caveat was set aside where eleven months from the date of its filing no action had yet been commenced. Reference was made to another case cited therein where a delay of 2½ months was held fatal (i.e. Singapore O.S. 192 of 1976). Also *Plimmer Bros. v. St. Muar* [1906] 26 NZLR 294.

The distinction between those cases (which are in any event only persuasive authority on their own facts) and this one is the difference between a bare cause of action and an established and accrued right. Chatib, on the authorities cited to me, seems to have already become an equitable owner. The contract so far as he was concerned had already been fully performed.

For two Malaysian cases where equitable owners in possession have had little difficulty in establishing their claims through the Courts notwithstanding a period of inactivity other wise reference may be made to:

(a) *Phang Swee Kim v. Beh I Hock* [1964] MLJ 383.
(b) *Tengku Mariah bte. Sultan Sulaiman v. Halimah bte Abdullah* [1980] 2 MLJ 234.

Yet another hurdle put before Chatib was a submission that Jet Age had paid over RM2 million towards the purchase price and that their interest charges were about RM24,000 a year. It was suggested that unless Chatib gave an undertaking as to damages should he fail at the trial the caveat should not be extended. No other authority except a passage extracted from *Eng Mee Yong's* case was cited to say that Chatib had to show 'that he would be in a position to satisfy the undertaking as to damages if the action should fail at the trial'. It was suggested that very heavy damages would be incurred if the caveat was not set aside.

This argument is 'in terrorem' and if allowed will have the effect of shutting out impoverished litigants from the temple of justice simply because they cannot insulate their wealthy antagonists from the perils of litigation.

It is well established that poverty alone is not a ground for applying for security of costs. Is there a parallel here?

A careful examination of the relevant passage in *Eng Mee Yong's* case (F-I RHC p. 215) will show that an undertaking as to damages is a concomitant to an order granting interlocutory injunction i.e. an order of Court restraining the defendant from doing something. If infringed, there are penal sanctions which can be invoked.

A caveat on the other hand, even though it has the features similar to an interlocutory injunction is, to my mind, a means of giving notice to the world of the caveator's rights so that the same may enjoy a measure of protection. It may be analogous to but cannot in all respects be equated to an injunction. The incapacity to register a dealing because of a prior caveat does not preclude the legal owner doing other things which falls short of registration. I am unable to agree that an undertaking as to damages is a *sine qua non* to an order extending a caveat.

If I am wrong here, we must address our minds to the quantum of the undertaking. *Kerr on Injunctions* 6th Edn., pp. 644, 645 cites *Pike v. Cave* LJ Ch 937, 68 LT 650 as authority for the proposition that an undertaking as to damages can be given by a married woman even if her separate estate is insufficient to satisfy the damages of the opposite party. *Rowe on the Law of Injunctions* 5th Edn., 1980 p. 275 talks of injunction bonds which seem to relate to the American practice. For the English practice he resorts to Kerr at pp. 27 & 28 and does not take the position further. *Halsbury's Laws of England* 4th Edn., para. 1072, also does not suggest that the undertaking must be backed by collateral, nor does *Atkin's Court Forms* 2nd Edn., Vol. 22 see pp. 70, 71 and see Form II p. 90. This dispensation of the undertaking is the exception rather than the rule but all the authorities so far cited do indicate that the undertaking is the plaintiff's own recognizance.

Section 226(3) of the Companies Act 1965 gives the Court the power to impose terms when granting leave. Section 326(2) of the National Land Code does not fetter the Court thus in so many words, but the power must of course be exercised judicially, the terms should be imposed only where the circumstances of the case so require: See *Syed Ibrahim bin Syed Abdul Rahman v. Liew Su Chen (f)* Federal Court Civil Appeal No. 102 of 1983 (unreported).

But on this aspect of the case there was a clear overlap. The fact that the legal title to the property was in Jet Age's hands taken in all the circumstances of this case was enough to my mind to entitle Chatib to an unconditional extension of the caveat subject only to the disposal of the action.

Actual prior knowledge of the encumbrances of the said land was a material consideration here. But Jet Age is a limited Company. In the course of their submissions I therefore requested Counsel for information as to the identity of the substantial shareholders of that Company.

I received no assistance from Mr. Suppiah in this connection. Miss Lim however provided the Court with the results of a search in the Company's Registry. This showed that Messrs Jaginder Singh and Pakrisamy Suppiah were the shareholders and directors of the Company. They were also the incumbent partners of Suppiah and Singh.

All this is very disappointing. The rule that advocates and solicitors acting as such should not put themselves in a situation where they have a conflict of interest is too well established to need authority. The implications of what has happened here may best be resolved elsewhere.

So far as the case is concerned, the reasons why I have granted leave and extended Chatib's caveat will inevitably affect the position of the various other caveators whose position is similar to that of Chatib's. To prevent needless duplication consideration should be given to consolidation or making one case a test case. Due consideration will also be given to any application for an early trial subject of course to the appeal being pursued against the decision.

Also found at [1984] 2 CLJ 30